the most careful man does, a line is drawn before the first word and after the last clean to the signature. Universal practice cannot be negligence." See 38 Cent. L. J. 90.

The subject of forgery is discussed at length, with especial reference to checks, in note to *Peoples Bank v. Franklin Bank* (Tenn.), 17 Am. St. Rep. 889–899.

(4) *Incapacity—Corporations.* Incapacity to contract, whether legal or natural, is a defence in all cases in favor of the incompetent party. Infancy, coverture and (probably) insanity are valid absolute defences to negotiable paper. Bigelow on Bills, Notes and Cheques (Students' Series), 200–201; 1 Min. Inst. (4th ed.) 512–513; monographic note on infants' contracts, in 18 Am. St. Rep. at p. 643 and following; *Carrier v. Sears*, 4 Allen, 336 (insanity).

Where a corporation inherently lacks the power to issue negotiable paper of the kind under consideration, under any circumstances, such paper will be void in the hands of a *bona fide* holder for value. It is otherwise, as a general rule, where there is merely an irregular exercise of the power, not apparent from the face of the instrument. See 4 Thompson Corp. sec. 5737 *et seq;* 1 Dillon Munic. Corp. 513 *et seq; Northern Bank v. Porter*, 110 U. S. 608; *Nesbitt v. Riverside*, 144 U. S. 610. And any one who takes negotiable paper made or endorsed by a corporation, must at his peril see that the person assuming to act for the corporation has authority (express or implied) for the purpose. 2 Morawetz Corp. 606; *Davis v. Rockingham Investment Co.* 89 Va., 290. W. M. L.

NORFOLK & WESTERN RAILROAD COMPANY v. JOHNSON.*

Virginia Court of Appeals: At Wytheville.

(July 11, 1895.)

1. RAILROADS—*Fencing roadbeds—killing stock—negligence.* A railroad company which has not complied with the provisions of section 1258 of the Code relating to fencing its road-bed, is liable to the owner of the land for the value of his stock killed by its engines and cars within the boundaries required to be fenced, though such stock was not killed by the negligence of the company in the management and running of its engines and trains. *McGavock's Adm'r v. Norfolk & Western R. R.*, 90 Va. 507, *approved.*

Writ of error to a judgment of the Circuit Court of Washington county, rendered October 9, 1894, in an action of trespass on the case, wherein the defendant in error was the plaintiff, and the plaintiff in error was the defendant. *Affirmed.*

The opinion states the case.

Fulkerson, Page & Hurt, for the plaintiff in error.

Daniel Trigg and *Jno. W. Price,* for the defendant in error.

*Reported by M. P. Burks, State Reporter.

HARRISON, J., delivered the opinion of the court.

This action was brought to recover damages for the careless and negligent killing of a valuable colt, the property of the plaintiff, by the defendant company.

The evidence certified shows that the colt mentioned in the declaration was the property of the plaintiff, and that it was killed by being struck by the locomotive of a train upon the road of the defendant company; that at the place where the animal was struck and killed the road of the defendant passes through the enclosed lands of the plaintiff; that the road-bed of the defendant company was not fenced at this point; that there was at said point no cut or embankment with sides sufficiently steep to prevent the passage of stock, and that the place is not in an incorporated town or city, or in an unincorporated town. The proof also shows that the animal in question was a very fine thoroughbred mare, fully worth $500, the sum for which the jury rendered a verdict. The evidence further shows that the animal was not killed by the negligence of the defendant company in the management and running of its train.

The only question presented for consideration in this case, is raised by the following instruction offered by the plaintiff in error and refused by the court:

"The court instructs the jury that if they believe from the evidence that the colt in question was killed by an unavoidable accident, and that the defendant could not by the exercise of ordinary care in running the train in question, have avoided the accident, then the jury should find for the defendant."

This instruction ignores entirely the negligence of the company in having disregarded the express mandate of the law, that it should cause to be erected along its line and on both sides of its road-bed, through all enclosed lands or lots, lawful fences, and assumes that, notwithstanding its default in this regard, the plaintiff is not entitled o recover if the company has been guilty of no negligence in the mere running of its train. The instruction was properly refused. Section 1261 of the Code, which provides that, "In any action or suit against a railroad company for an injury to any property, on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants," must be interpreted in the light of other sections in chapter

52 of the Code of 1887, from which it is taken. As we have already seen, section 1258 is an express requirement of the law that the railroad company shall fence its road-bed on both sides with a lawful fence. There are certain exceptions to this positive mandate set forth in the chapter referred to; they do not, however, affect this case.

The recent case of *McGavock's Adm'r v. N. & W. R. R. Co.*, 90 Va. 507, was a much stronger case in favor of the railroad company than the one at bar. This court has, in that case, interpreted the law here called in question, and has construed it adversely to the plaintiff in error, holding that the failure of the company to erect a lawful fence as required by the statute, makes it amenable to the law and liable to respond in damages for the injury to or killing of stock.

The case at bar is controlled by *McGavock's Adm'r v. N. & W. R. R. Co.* just referred to, and the judgment of the Circuit Court must therefore be affirmed. *Affirmed.*

BY THE EDITOR.—*Quaere.* The case reported above and that in 90th Va. cited in the opinion were cases in which the stock killed or injured was the property of the plaintiff who owned the lands through which the railroad was constructed. Is the statute (secs. 1257, 1259, 1260, 1261 of the Code) confined to such cases, or does it extend to cases where the plaintiff is not the owner of the "enclosed lands" and his stock strays over them to the unfenced railroad without any fault of his? The language of these Code provisions is certainly very broad and the question suggested without discussion is by no means free from difficulty.

NICHOLAS V. COMMONWEALTH.*

Virginia Court of Appeals: At Wytheville.

(July 18, 1895.)

1. CRIMINAL LAW—*Death sentence not executed—re-sentence.* Where sentence of death has been pronounced upon a criminal, but not carried into execution, and the day for execution has passed, the court which pronounced the sentence may fix another day for its execution, though jurisdiction to try similar cases in the future has, in the meantime, been taken away from the court. Fixing another day of execution is not the entry of a further judgment, nor even a judicial act, it is simply carrying into execution a judgment already existing.

Petition for a writ of error to an order of the Circuit Court of Henrico county fixing another day for the execution of the judgment of death of the petitioner. *Denied.*

* Reported by M. P. Burks, State Reporter.